Supreme Court, U.S.
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No. 89-1208

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

LOCAL 530 OF OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL ASSOCIATION,

Petitioner,

v.

DRYWALL TAPERS AND POINTERS OF GREATER NEW YORK, LOCAL 1974 OF I.B.P.A.T., AFL-CIO, on its own behalf and on behalf of all persons, etc.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

BURTON H. HALL
Attorney for Respondents
401 Broadway
New York, N.Y. 10013
(212) 431-9114

Of Counsel:
Wendy E. Sloan
Hall & Sloan

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QUESTION PRESENTED

1. Where:

(i) a district court has, after a full evidentiary hearing, enjoined a labor union from causing or permitting its members to perform any work at, certain specified and clearly identified jobsites; and

(ii) the labor union nevertheless has asserted jurisdiction over those jobsites and has knowingly and willfully caused and permitted its members to perform work on them, and has taken no steps whatever to prevent its members from performing work on them despite its knowledge that they were doing so; and

(iii) the district court has, on motion duly served upon the labor union and after a further evidentiary

hearing, made specific and detailed findings of fact, finding that the labor union willfully violated the injunctive order by causing and permitting its members to perform work on the specified jobsites; and

(iv) after such finding, the district court has held a further evidentiary hearing and, after such hearing, has made findings and awarded compensatory damages to certain of the claimants in their proven damage amounts; and

(v) the court of appeals has, on review, approved the district court's findings and damage awards;

is it error for the court of appeals to affirm the district court's judgment of contempt?

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§ 8(a)(2) and (5) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 158(a)(2) and (3) 15

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BRIEF FOR RESPONDENT IN OPPOSITION

Opinion Below

The Opinion of the Court of Appeals for the Second Circuit is reported at 889 F.2d 389.

Statement of the Case

There exist in the construction industry both a national Plan for the Settlement of Jurisdictional Disputes and local plans in several cities. One of the latter plans is known as the New York Plan and is applicable to New York City. Both plans are contracts between labor organizations and employers.

The New York Plan is established by, and administered jointly by, the Building Trades Employers' Association of New York City ("BTEA") and the Building and Construction Trades Council of Greater New York ("BCTC"), the former an employer group, the latter a union group. Under the New York Plan, BTEA arbitrates any jurisdictional dispute as to which there has not been a previous award; its award governs assignment of all work of the kind in question on all future jobs; and BCTC's duty is to enforce the award.

In March 1978 the national plan's Hearing Panel rendered a decision establishing what type of drywall taping work would belong to the Painters' Union (and thus to Local 1974) and what kind to the Plasterers' Union (of which Local 530 is an affiliate).

In 1980, BTEA arbitrated a claim by Local 1974 that at a particular jobsite in New York Local 530 was performing work that belonged to Local 1974 pursuant to the Hearing Panel's decision. After an arbitration hearing, BTEA's executive board rendered an award in favor of Local 1974, finding that the work belonged to it, against Local 530. Local 530 had an opportunity to appeal to the organs of the national plan but decided not to do so. The BTEA's decision of June 24, 1980 therefore is final and binding.

The New York Plan provides that each arbitration award shall govern assignment

of all work of the kind in question on future jobs within the City of New York.

Local 1974 instituted this action in 1981, alleging that Local 530 was violating the BTEA's award and that BCTC had failed to enforce the award. In 1983, after continued failure to perform its enforcement function, BCTC was joined as a defendant along with Local 530.

After BCTC had been joined as defendant, BCTC held a hearing upon a request by Local 1974 for enforcement of the BTEA's award with regard to 31 jobsites at which, Local 1974 alleged, Local 530 was causing its members to perform work that was of the kind in question in the BTEA award. After the hearing, BCTC upheld Local 1974 and ordered Local 530 to remove its members from the jobsites.

Local 530 failed to comply with the BCTC's enforcement order and BCTC failed to enforce it. Local 1974 moved in the

district court for an order enjoining Local 530 from permitting its members to perform work on the 31 jobsites.

The district court issued a preliminary injunction, enjoining Local 530:

> ... from asserting jurisdiction over, and from causing or permitting members of such labor union to perform work at, any of the following jobsites within the City of New York: ... [jobsites listed].

The court then set the issue of those 31 jobsites, and one other, for trial, held at the end of January 1984. Following the five-day trial, the court issued an Opinion and permanent injunctive Order, identical in substance to the preliminary injunction, in regard to the 32 jobsites.[1]

Immediately upon issuance of the preliminary injunction, Local 530 moved

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[1] The injunctive orders therefore bear no resemblance whatever to those described in the second and fourth "Questions Presented," as formulated by Local 530.

for a stay of the preliminary injunctive order. In support of its motion, Local 530 submitted an affidavit of its counsel, describing the order as "enjoining Local 530 and its members from performing any work on thirty-one specified job sites within the City of New York," adding that as a result of the injunction the Local 530 members working ont the jobsites "will be out of work" and further stating that under the preliminary injunction

> ... Local 530 members are enjoined from performing any work at the thirty-one affected jobs.
>
> (Emphasis in original).

Upon the district court's denial of its motion, Local 530 moved in the Court of Appeals for a stay, again with an affidavit of its counsel saying that as a result of the order Local 530's members "will be out of work" and ""will be en-

joined from performing any work at the thirty-one affected jobs."

Moscatiello, Local 530's President and Business Agent, subsequently testified that he understood the injunctive orders in those terms: that all Local 530 members would have to stop work on the jobsites.

Local 530 appealed from the permanent injunctive order on February 9, 1984. Without a published opinion, the Court of Appeals unanimously affirmed the permanent injunction on April 13, 1984. No petition for certiorari was filed.

Moscatiello knew or soon learned that Local 530 members were continuing to work on the jobsites. Moreover, two of Local 530's executive board members, and one of its Trustees, were among those continuing to do so. However, aside from a pro forma letter to the membership, he

did nothing to stop them from working on the jobsites.

Local 1974 moved repeatedly to have Local 530 adjudged in contempt. Its first motion was stymied by Local 530's counsel, who falsely represented to the court that the men working on the jobsites had resigned membership in Local 530; see: 17a. After further discovery, however, Local 1974 brought a second motion.

An evidentiary hearing was held before Hon. John L. Caden, United States Magistrate.

After submission of memoranda by counsel, the Magistrate issued a Report and Recommendation ("R&R"), in which he made detailed findings, establishing that Local 530 had violated the injunctive orders. And he found that the violation was willful. Part of his finding was that the lack of effective action by

Local 530 "was due to Local 530's willful avoidance of an order that it found distasteful."

The Magistrate therefore recommended that Local 530, Moscatiello, Local 530's counsel, and certain employers be adjudged in contempt. Each of the contemnors submitted Objections.

On its de novo review, the district court, Hon. Eugene H. Nickerson, Judge, modified the R&R. With regard to Local 530, his findings were substantially identical to those of Magistrate Caden findings 35a-36a, 60a-61a. Judge Nickerson also made additional findings in response to Local 530's Objections; 61a-

76a.[2] His Opinion and Order adopted R&R as modified; 111a.

Judge Nickerson's Opinion referred the matter to Magistrate Caden for assessment of damages; 110a. In 1987-1988, Magistrate Caden conducted a full evidentiary hearing on claims for damages. Subsequently, Magistrate Caden submitted a new R&R, assessing damages suffered by Local 1974's members by reason of Local 530's contempt.[3] It was

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[2] Thus Local 530 is mistaken in suggesting, in its formulation of the third of the "Questions Presented," that "there were no findings in the district court." Local 530 is likewise mistaken in suggesting, in the same Question, that there was no briefing or argument in the court of appeals as to the the contumacious conduct. There was such briefing and argument.

[3] Contrary to the first "Question Presented," as formulated by Local 530, no "penalties" were imposed. However, damages were awarded to those Local 1974 members who proved that they had lost earnings because of the contempt.

Also contrary to Local 530's formulation of that "Question," the injunctive

modified by Judge Nickerson, and adopted as modified.

Local 530, its counsel, and the employers appealed; the Court of Appeals affirmed as to Local 530's contempt but reversed as to the others on the ground of inadequate notice.

REASONS FOR DENYING THE WRIT

I.

The injunctive orders were clear and Local 530 fully understood their meaning

The injunctive orders clearly and unambiguously enjoined Local 530, its officers and persons in concert with it, from "causing or permitting members of such labor union to perform work at" any of the 32 jobsites.

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orders provided Local 530 clear notice of the conduct prohibited.

The orders thus left no doubt in the minds of those to whom they were addressed. In the affidavit of its counsel, in support ofits motion for a stay, Local 530 itself described the preliminary injunctive order as "enjoining Local 530 and its members from performing any work on thirty-one specified job sites...."

Local 530 thus understood that to be the meaning of the injunctive orders when it appealed from their issuance in 1984. The Court of Appeals affirmed their issuance but Local 530 did not petition this Court for certiorari, nor did it move for rehearing on the issue of their breadth or their meaning. It can hardly complain of them now; See: McComb v. Jacksonville Paper Co., 336 U.S. 187, 192, 69 S.Ct. 497, 93 L.Ed. 599, 604 (1948); Regal Knitwear Co. v. NLRB, 324 U.S. 9, 15, 65 S.Ct. 478, 482, 89 L.Ed. 661, 667 (1944).

But Local 530 consciously and willfully violated the orders; 110a. And see: Point III, infra.

Even if Local 530's present assertions be credited, it willfully chose to "make [its] own determination of what the decree meant" and in so doing "knew [that it] acted at [its] peril." McComb, supra, 336 U.S. at 192.

II.

The injunctive orders did not interfere or require Local 530 to interfere with the rights of Local 530's members to join or not join a union

The injunctive orders enjoined Local 530 from asserting jurisdiction over, and from causing or permitting its members to perform work at, certain jobsites. More simply put, they required Local 530 to pull its members off the jobsites.

The orders did not order anyone, or require anyone, or direct Local 530 to

compel anyone to resign membership in Local 530; nor did they require Local 530 to interfere with its members' rights to join or not join any other union.

The orders thus did not in any way infringe or prejudice any of the statutory or constitutional rights of Local 530's members. Cf. NLRB v. Radio and Television Broadcast Engineers Union, Local 212, 364 U.S. 573, 584, 181 S.Ct. 330, 5 L.Ed.2d 302, 309 (1961) (NLRB determination, awarding work to one union as opposed to another, does not violate non-discrimination requirements of §§ 8(a)(2) and (3) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 158(a)(2) and (3)).

III.

Local 530 willfully violated the injunctive orders

Moscatiello and Local 530 knew or soon learned that Local 530's members were working on the jobsites. Moreover, at least three officers of Local 530 -- two executive board members and a Trustee -- were among those working on the jobsites. They continued to work on those jobsites until the jobs ended. But as Moscatiello testified, he "didn't do anything about it." Nor did Local 530 do anything about it.

There was much that Local 530 could have done, and was under an obligation to do, to see to it that the injunctive orders were obeyed. For example, it could have disciplined, or threatened with discipline, members who violated it. Cf. NLRB v. Allis-Chalmers Mfg. Co., 388 U.S.

175, 196, 87 S.Ct. 2001, 18 L.Ed.2d 1123 (1967); Scofield v. NLRB, 394 U.S. 423, 89 S.Ct. 1154, 22 L.Ed.2d 385 (1969). Nor would such discipline have violated any law or public policy; cf. Pattern Makers' League v. NLRB, 473 U.S. 95, 102, 105 S.Ct. 3064, 87 L.Ed.2d 68, 74 (1985).

But Local 530 did nothing -- except send a pro forma letter advising members of the injunctions.

Magistrate Caden, after a lengthy evidentiary hearing, found that the lack of effective action by Local 530 "was due to Local 530's willful avoidance of an order that it found distasteful."

The Magistrate thus found that Local 530 had violated the injunctive orders. His finding that the violation was "willful" is in accord with the ordinary meaning of that term, see: McLaughlin v. Richland Shoe Company, 486 U.S. ___, ___,

108 S.Ct. 1677, 1681, 100 L.Ed.2d 115, 123 (1988).

Judge Nickerson, reviewing Magistrate Caden's Report de novo, approved that finding; 35a-38a, 61a, 110a. On Local 530's motion for rehearing, Judge Nickerson adhered to that finding.

The Court of Appeals, on Local 530's appeal, approved that finding; 13a-17a, 21a. And it adhered to it on Local 530's motion for rehearing; 27a.

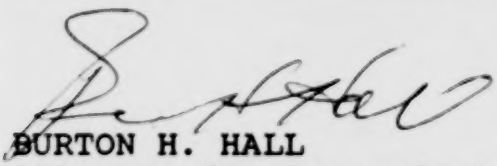
In short, two courts have, with much deliberation, made or approved factual findings of Local 530's violation of the injunctive orders. Those findings should not be reviewed anew on certiorari. cf. Goodman v. Lukens Steel Co., 482 U.S. 656, 665, 107 S.Ct. 2617, 2623, 96 L.Ed.2d 572, 584 (1987); United States v. Doe, 465 U.S. 605, 613-614, 104 S.Ct. 1237, 1242-1243, 79 L.Ed.2d 552 (1984); Rogers v. Lodge, 458 U.S. 613,

623, 102 S.Ct. 3272, 73 L.Ed.2d 1012, 1021 (1982); Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275, 69 S.Ct. 535, 538, 93 L.ed. 672, 676-677 (1949).

Conclusion

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,



BURTON H. HALL
Attorney for Respondents
401 Broadway
New York, N.Y. 10013
(212) 431-9114

HALL & SLOAN
WENDY E. SLOAN
Of Counsel

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